

University of Dundee

The Government's Independent Human Rights Act Review

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Written evidence from Dr Jacques Hartmann¹ and Samuel White² University of Dundee (HRA0016)

1. This response focuses on the following question:

‘Has the Human Rights Act led to individuals being more able to enforce their human rights in the UK?’

2. Prior to the Human Rights Act (HRA), there was a rising trend of judgments against the UK by the European Court of Human Rights (ECtHR). Examining the case law, it is clear that the UK lost an increasing number of cases between the first lost case in 1975³ and the adoption of the HRA in 1998.⁴ The growth in lost cases highlights that the UK was failing to

enforce individual rights in domestic law.

Chart 1 showing increasing findings of violation against the UK by ECtHR before the HRA.

3. Before the HRA, UK courts made use of the ECHR in order to inform their decision-making. Lord Bingham highlighted this when he noted that ‘...the Convention exerted a persuasive and pervasive influence on judicial decision-making in this country, affecting the interpretation of ambiguous statutory provisions, guiding the exercise of discretions, bearing on the development of the common law.’⁵

4. Despite its increasing influence, breaches of the ECHR were not directly actionable in UK courts. Moreover, at the time of the introduction of the Human Rights Bill, the then

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³ *Golder v UK* (1975) 1 EHRR 524.

⁴ Figures taken from the ECtHR’s statistics (<<https://www.echr.coe.int/Pages/home.aspx?p=reports&c=>> accessed 18 February 2021) and Alice Donald, Jane Gordon and Philip Leach, *Research Report 83: The UK and the European Court of Human Rights* (Equality and Human Rights Commission 2012).

⁵ *R v Lyons* [2003] 1 AC 976 [13].

Government noted that ‘The effect of non-incorporation on the British people is a very practical one... enforcing [rights] takes too long and costs too much’.⁶ Taken together with the rise in cases lost, these statements highlights that the ‘pervasive influence’ of the ECHR alone was insufficient to secure proper enforcement of individual rights in domestic law.

5. The HRA, for the first time, allowed individuals to bring direct legal challenges before domestic courts for breaches of the ECHR, which represented a significant shift in human rights protection in the UK.⁷ That the HRA has led to individuals being more able to enforce their human rights in the UK is also borne out by an analysis of the UK’s track record before the ECtHR since the HRA received royal assent in 1998. The chart below shows the number of judgments against the UK before the ECtHR from the first full calendar year after the HRA received royal assent to 2018.⁸

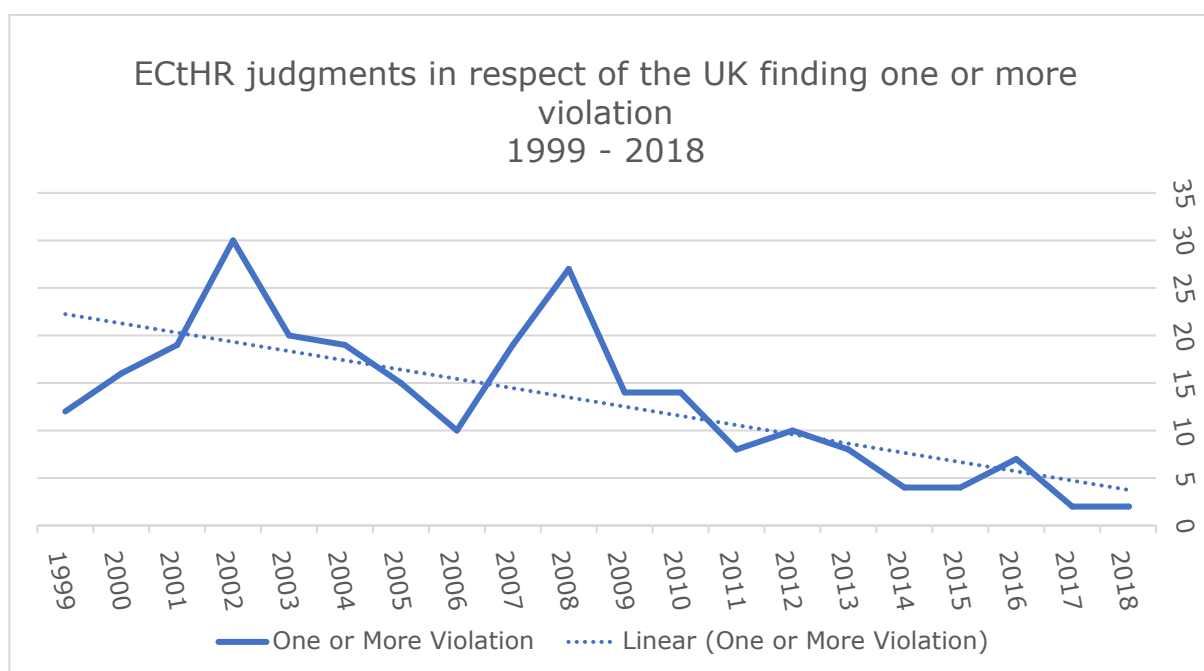


Chart 2 showing decreasing findings of violation against the UK by ECtHR after the HRA.

6. Whilst data based on ECtHR judgments is, to some extent, a blunt instrument for understanding the impact of the HRA, it appears to illustrate that the UK’s track record has improved after the HRA entered into force. This in turn suggests that the HRA has empowered domestic courts to deal more effectively with applicants who allege that their

⁶ Home Department, *Rights Brought Home: The Human Rights Bill* (1997) para 1.14. The report suggests that in 1997 it took on average five years and £30,000 to bring a case before the ECtHR. This would be a prohibitive hurdle to many would-be applicants.

⁷ The protected ECHR rights are contained in a schedule to the HRA. The HRA does not incorporate Art 13 (the right to an effective remedy), this was justified on the basis that the HRA itself provided an effective remedy, see e.g. David Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd edn, Oxford University Press 2002) 82–83.

⁸ Figures taken from the ECtHR’s statistics (<<https://www.echr.coe.int/Pages/home.aspx?p=report&c=>> accessed 18 February 2021) and Donald, Gordon and Leach (n 4). The HRA did not have full legal effect until it entered into force on 2 October 2000.

human rights have been infringed, ensuring individuals are more able to enforce their rights in the UK.

7. This assertion is also borne out by an analysis of the ECtHR's decisions in relation to Article 13 and the UK. Article 13 provides for the right to an effective remedy. It was not included within the HRA's protected rights, as the view was taken that the HRA itself provided an effective remedy.⁹ As the chart below illustrates, the number of breaches of Article 13 found by the ECtHR has decreased consistently since the HRA entered into force, suggesting that the HRA has provided claimants with an effective remedy in cases where

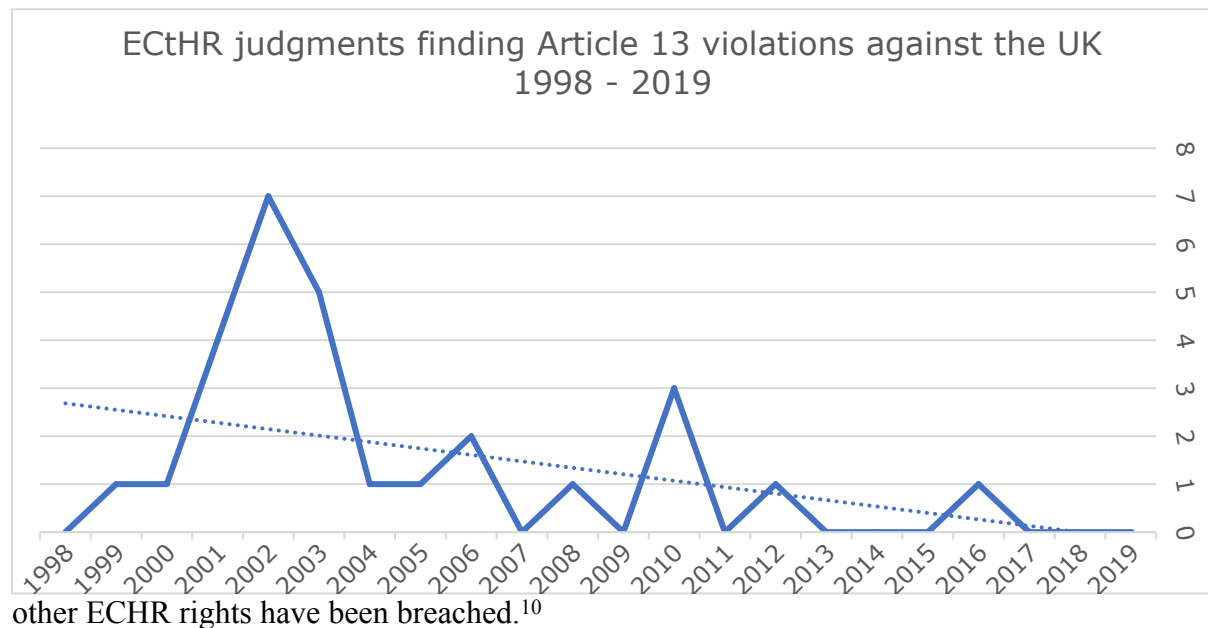


Chart 3 showing decreasing findings of violation of Article 13 against the UK by ECtHR after the HRA.

8. Although the number judgements against the UK in Article 13 cases (Chart 3) appears to show an increase in the years immediately after the HRA's entry into force, this was expected. Professor Merris Amos suggested that it was likely that any change brought about by the HRA in respect of the findings of the ECtHR would not be evident until 2005 as cases worked their way through the domestic system.¹¹ Since 2005 there have only been 9 cases in which the ECtHR found the UK in breach of its obligations under Article 13.¹²

⁹ David Feldman, *English Public Law* (2nd edn, Oxford University Press 2009) 82–83; Dominic McGoldrick, 'The United Kingdom's Human Rights Act 1998 in Theory and Practice' (2001) 50 *International & Comparative Law Quarterly* 901, 907.

¹⁰ Data taken from Joanna Dawson, 'Briefing Paper: UK Cases at the European Court of Human Rights since 1975' (House of Commons Library 2019) CBP 8049.

¹¹ Merris Amos, 'Dialogue with Strasbourg' (Tenth Anniversary of the Human Rights Act Symposium, Durham Human Rights Centre Conference, 24 September 2010). Quoted in Donald, Gordon and Leach (n 4) 36.

¹² Data from Dawson (n 10).

9. The clear and consistent trends of fewer findings of human rights violation against the UK lends credence to the suggestion that the HRA has allowed individuals to better enforce their rights in domestic courts.

10. Despite the above evidence suggesting that the HRA has meant individuals being more able to enforce their human rights as expressed in the ECHR, it is appropriate to highlight that it does not offer direct enforcement of other human rights, such as those in the nine 'core' human rights instruments of the United Nations.¹³ In this regard, the Human Rights Committee, overseeing the International Covenant on Civil and Political Rights (ICCPR), has noted that the ICCPR 'is not directly applicable in the [UK] and... recalls that several Covenant rights are not covered by [HRA].'¹⁴

11. Indirectly, the HRA may have ensured better protection of the ICCPR as the latter has been more widely mentioned by the UK courts since the HRA entered into force, although even where the ICCPR is mentioned it is not widely relied upon in final judgments, which seems to suggest that incorporation is important.¹⁵ Thus, it remains the case that the majority of rights protected by treaties to which the UK is a party are not currently enforceable directly in the UK courts as they have not been incorporated into domestic law.

12. Although there has been growing debate about the place of the HRA more than 20 years after it entered into force, the above cited data seems to suggest that the changes brought about by the HRA have been positive. Individuals are more able to enforce some human rights in the UK.

13. Moreover, what little polling data there is appears to show that the public are supportive of the existing framework of human rights protection.¹⁶ Bearing this in mind, any recommendations on the future of the HRA should take into account that although the political discourse points to a major backlash against human rights, little data actually exists to support any such claim.¹⁷

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¹³ For an overview, see 'The Core International Human Rights Instruments and their monitoring bodies' (UN Office of the High Commissioner for Human Rights) <<https://www.ohchr.org/en/professionalinterest/pages/coreinstruments.aspx>> accessed 18 February 2021.

¹⁴ UN Human Rights Committee 'Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland' (17 August 2015) UN Doc CCPR/C/GBR/CO/7, para 5.

¹⁵ See Samuel While 'Does incorporation of international human rights instruments secure significantly better enforcement of individual rights in UK courts?' (PhD thesis, University of Dundee, 2021).

¹⁶ See e.g. 'Building a Human Rights Culture in Scotland' (Scottish Human Rights Commission 2018); Kelly Kaur-Ballagan and others, 'Public Perceptions of Human Rights' (Equality and Human Rights Commission 2009).

¹⁷ Jacques Hartmann and Samuel White, 'The Alleged Backlash against Human Rights: Evidence from Denmark and the UK' in Kasey McCall Smith, Andrea Birdsall and Elisenda Casanas Adam (eds), *Human Rights in Times of Transition: Liberal Democracy and Challenges of National Security* (Edward Elgar 2020).